STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PHILLIP JOSEPH STEGALL,

APPELLANT

APPELLATE CASE NO. 2015-001994

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

Did the trial judge err by admitting evidence of a 2011 argument between Appellant and his ex-wife, Jessica Lynn Stegall, in which Appellant made threats, where the argument occurred three years prior to the alleged incident, Appellant and his ex-wife reconciled after the argument, any probative value the evidence had was substantially outweighed by unfair prejudice to Appellant, and the judge erroneously ruled the three-year old threat was part of the *res gestae*?

STATEMENT OF THE CASE

On November 25, 2014, the Greenville County Grand Jury indicted Appellant for solicitation of a felony. R. 21 Appellant's case proceeded to a jury trial before the Honorable D. Garrison Hill. R. 1. John V. Crangle represented Appellant. Stan L. Overby represented the State. R. 1.

After a three-day trial, the jury found Appellant guilty. R. 277. Judge Hill sentenced Appellant to ten years' imprisonment. R. 282.

Appellant appealed his conviction and sentence. This appeal follows.

STATEMENT OF FACTS

According to Henry Manson, he and Appellant met in 2011 when he began working for Appellant's landscaping business in Greenville County, South Carolina. R. 52, ll. 13 – 22. Manson also lived with Appellant briefly during 2011. R. 53, ll. 20 – 25.

On Saturday, January 25, 2014, Manson called Appellant from his hotel room at the Motel 6, where Manson had been staying, and invited Appellant over. R. 56, ll. 9 – 13. Appellant came over and he and Manson began drinking alcohol and talking about Appellant's ongoing custody battle with his ex-wife, Jessica Lynn Stegall. R. 56, ll. 15 – 23.

Manson claimed that Appellant started talking about "[h]aving her gone" so that he could have custody of his son. R. 57, ll. 1 – 12. As part of Appellant's alleged plan, Manson would go to the Buffalo Wild Wings in Greenville, where Jessica worked, and wait for her to get off. R. 58, ll. 13 – 15. Manson would then shoot Jessica, jump over the fence near the restaurant, and run to a nearby location where Appellant would be waiting for him. R. 58, ll. 13 – 15. Manson claimed that Appellant offered to pay him $5,000 with a payment of $750 the following week. R. 58, ll. 7 – 10.

Manson called the Simpsonville Police Department the next morning, Sunday, January 26, 2014, to tell them about the alleged plan. R. 64, ll. 2 – 5. Manson provided a statement to police, who requested that Manson wear a wire to record his conversation with Appellant. R. 65, ll. 12 – 24. Manson told police that Appellant was supposed to return to Manson's hotel room to pick him up and drive over to the restaurant to "look things over." R. 67, ll. 17 – 24.

Appellant arrived at Manson's hotel room around 10:00 a.m. R. 69, ll. 9 – 11. Manson started asking Appellant about the $5,000, but Appellant "spotted all the officers outside." R. 69, ll. 12 – 25. Appellant was arrested at the hotel and charged with solicitation of a felony for allegedly attempting to hire Manson to kill his ex-wife. R. 70, ll. 8 – 12.

Motion in *Limine* to Exclude Prior Recorded Phone Call

Prior to trial, defense counsel moved to exclude a prior recorded phone call between Appellant and his ex-wife, Jessica, from 2011 in which Appellant made threats. R. 9, ll. 20 – 24. During the phone conversation, Appellant and Jessica began arguing and Appellant made a reference to "burying" her and getting away with it. R. 11, ll. 15 – 18.

Defense counsel argued:

> "It's the defense's position, one, that this evidence is two and a half years – **it's almost 900 days old** – or separated from the two events. They're pretty distinct events, Judge.
>
> The second thing is, I think it's extremely prejudicial to my client, basically, bringing up prior criminal domestic violence altercations and a public disorderly conduct conviction without my client taking the stand and putting his character at issue, Judge.
>
> And, therefore, I think, one, **it's too remote**. And I don't think it really is relevant to the case at bar. The question for this case is, did my client hire someone to kill his ex-wife, not was my client and his ex-wife arguing in 2011."

R. 10, ll. 6 – 19 (emphasis added). Counsel concluded:

> "I mean, you're talking about **a 900-day difference**. And that's why I think it's, one, not relevant. And if you do find it relevant under 404(b), I would still move to exclude it under 403 as extremely prejudicial. And it would confuse the jury as to what they're here for today on."

R. 11, ll. 1 – 6 (emphasis added). The solicitor contended that Appellant's threats during the argument "goes to the intent." R. 11.

The trial judge declined to make a ruling and informed defense counsel and the solicitor that he will "have to see how the trial unfolds, and what the testimony and other evidence will show" before he makes a ruling. R. 12, l. 22 – R. 13, l. 2.

Defense counsel made a contemporaneous objection when the recording was offered into evidence. R. 215, ll. 5 – 10. However, the judge admitted the recording. The judge ruled that the evidence "shows motive and intent" and is not being offered to prove the character of Appellant. R. 218, ll. 11 – 15. The judge found it "troublesome" that the recording was from three years prior. R. 219, ll. 23 – 25. He stated that it "arguably render[ed] the statements less probative." R. 219, ll. 23 – 25.

The judge continued:

> "And, therefore, it could be argued that whatever probative value that 2011 recording had has become stale, so to speak, over time. There could be some change in the parties intent and motive in the intervening years."

R. 220, ll. 4 – 9.

However, the judge found that the evidence had "high probative value" that was not "substantially outweighed by those dangers set forth in Rule 403." R. 221, l. 1 – R. 222, l. 16. He ruled that the evidence would be also be admissible under *res gestae*, as "it does allow the fact finder to have a greater understanding of the context in which this alleged crime occurred if there was a prior threat." R. 221, l. 1 – R. 222, l. 16.

ARGUMENT

The trial judge erred by admitting evidence of a 2011 argument between Appellant and his ex-wife, Jessica Lynn Stegall, in which Appellant made threats, where the argument occurred three years prior to the alleged incident, Appellant and his ex-wife reconciled after the argument, any probative value the evidence had was substantially outweighed by unfair prejudice to Appellant, and the judge erroneously ruled the three-year old threat was part of the *res gestae*.

Evidence of the 2011 argument between Appellant and his ex-wife, Jessica, should have been excluded. The argument occurred nearly three years prior to the alleged incident and before the couple's divorce and subsequent custody case. Because the evidence was too remote, it was not part of the *res gestae* and any probative value it may have had was substantially outweighed by unfair prejudice to Appellant.

Evidence of prior bad acts is inadmissible to show propensity to commit the specific crime charged. Rule 404(b), SCRE. Such evidence may, however, be admissible to establish a motive, intent, absence of mistake, common scheme or plan, or identity of the perpetrator. Rule 404(b), SCRE; see also State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

Where those acts are not the subject of a conviction, they must first be proven by clear and convincing evidence. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007). Before evidence of prior bad acts can be admitted, "it must be put to a rather severe test." State v. Brooks, 335 S.C. 140, 142, 515 S.E.2d 764, 765 (Ct. App. 1999). The "acid test of admissibility is the logical relevancy of the other crimes." State v. Timmons, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997).

Even if such evidence is clear and convincing and falls within a Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; see also State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) ("When . . . the

previous alleged bad act is strikingly similar to the one for which [defendant] is being tried, the danger of unfair prejudice is enhanced.").

Evidence of a prior bad act is inadmissible as part of the *res gestae* "where the record does not support any relationship between the crime and the [prior bad act]." State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999) (citing State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)). Under *res gestae*, "it is important that the temporal proximity of the prior bad act be closely related to the charged crime." King, 334 S.C. at 513, 514 S.E.2d at 583. Such evidence must not be "so remote in time as to negate its probative value." State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) (finding evidence of a verbal altercation between defendant that the victim which occurred **three days prior** to the killing was not so remote in time as to negate its probative value and admissible to show motive) (emphasis added); see also King, supra (holding that evidence of defendant stealing money and items from his ex-wife in 1994 was remote and "too attenuated" to be admissible as *res gestae* of the armed robbery and murder of defendant's father-in-law in 1995).

Here, evidence of the 2011 argument between Appellant and his ex-wife was improper. The argument occurred almost three years before the alleged solicitation. In fact, Appellant and his ex-wife reconciled after the argument and continued their romantic relationship until they divorced in 2013. The fact that the argument occurred nearly three years before the alleged solicitation and before the custody case involving their three-year old son commenced negates **any** intent which could have been inferred from the argument. Even the trial judge expressed concern about the "temporal proximity" of the argument. R. 219, l. 21 – R. 220, l. 8.

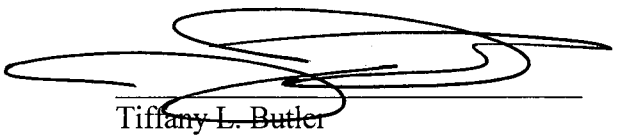
Further, evidence of the argument was not necessary to establish Appellant's alleged motive or intent to have his ex-wife killed. Manson had already testified that Appellant was frustrated due to the ongoing custody battle over his three-year old son and would discuss it with Manson. The

improper evidence was too remote in time to have any probative value. Because the evidence had no probative value, was not part of the *res gestae*, and was unfairly prejudicial against Appellant, it should have been excluded.

CONCLUSION

For the reasons argued above, Appellant Phillip Stegall respectfully requests this Court to reverse his conviction and sentence and remand to the lower court for a new trial.

Respectfully submitted,



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This 4th day of October, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 4th, 2016

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